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No. 2510

IN THE

United States Circuit Court of Appeals For the Ninth Circuit

SWAYNE & HOYT, INC.,
(a corporation),
Plaintiff in Error,

vs.

GUSTAV BARSCH,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

GILTNER & SEWALL,
Attorneys for Defendant in Error.

Filed this.....day of March, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Plaintiff in error presents in its appeal four assignments of error, numbered from I to IV inclusive, as is indicated by pages 12, 13 and 14 of the Transcript of Record.

However, in the brief of plaintiff in error, but two of said assignments of error are mentioned or discussed. They are Assignment I and Assignment IV.

Therefore, under the rules and practice of this court, as indeed under the rules and practice of

all courts, Assignment II and Assignment III must be deemed waived and abandoned.

Only two points are therefore involved in this appeal. They are the points raised by Assignment I and Assignment IV, and are to the following effect:

(a) That the court erred in refusing to direct a verdict for the defendant.

(b) That the trial court erred in applying the Oregon Employers' Liability Act of 1911.

Before taking up plaintiff in error's Assignments of Error A and B we respectfully submit that these points are not well taken and invite the court's attention to the following points:

The ground of the liability of plaintiff in error is that it was in control of the work of unloading the vessel "Camino" at the time defendant in error was injured. Plaintiff in error is now seeking to raise the point that the undisputed evidence shows that it was not in control of the unloading of this vessel, but that the control of such operation was in the hands of the owner of the vessel, the Western Steam Navigation Company. It is clear upon the face of this record that plaintiff in error is in no position to raise this queston. It is well settled that the question of the sufficiency of the evidence

to sustain a verdict can never be raised upon appeal unless such question was raised in the court below by a demurrer to the evidence, or what is equivalent thereto, a motion for a directed verdict.

Western Coal & Min. Co. vs. Ingraham, 70 Fed. 219.

German Ins. Co. vs. Frederick, 58 Fed. 144.

Pacific Mutual Ins. Co. vs. Snowden, 58 Fed. 342.

Drexel vs. True, 74 Fed. 12.

Citizens Bank vs. Fanwell, 63 Fed. 117.

Hartford Ins. Co. vs. Unsell, 144 U. S., 439.

Hansen vs. Boyd, 161 U. S., 397.

It is true that plaintiff in error did, at the close of all the evidence, ask the court to instruct the jury to find in favor of the defendant. The language of this motion is as follows:

"The defendant requested the court to give the following instruction to the jury:

" 'The jury is instructed to find for defendant.' "

Trans. p. 156.

This motion is insufficient, for the reason that

it does not specify any ground or point out wherein the evidence is insufficient. Indeed, it does not even state that the defendant claims that the evidence is insufficient. The well settled rule relating to motions for directed verdicts is that the defendant in fairness to the court and the opposing party must specify the particular defects in the plaintiff's case. The reason for this rule is obvious. It gives the plaintiff the opportunity of supplying the defects in the proof, and thus prevents his being taken by surprise at a time when it is too late for him to protect himself, namely, after the verdict has been rendered and the jury discharged. As sustaining this rule of practice, see:

United Engineering vs. Broadnex, 136 Fed. 352, 355.

38 Cyc. 1552.

The point was not properly raised by the motion for new trial, as this motion merely states that the evidence was insufficient to justify the verdict. Moreover, it is well settled that the ruling of the trial court in denying a motion for new trial does not present any matter for review on a writ of error to the Circuit Court of Appeals.

United Engineering vs. Broadnex, 136 Fed.

352.

For another reason this court cannot consider the question of the sufficiency of the evidence. The bill of exceptions shows upon its face that it does not contain all of the evidence. On the contrary, the certificate of the trial judge is that it contains substantially all of the evidence offered and received at the trial, with the exception of the evidence as to the extent, nature and character of the plaintiff's injuries and the damages sustained by him.

The case, therefore, comes within the rule of law that the appellate court will always presume in support of the judgment that there was evidence to support it not disclosed by the bill of exceptions, unless the bill of exceptions shows that it contains all of the evidence that was adduced in support of the vital elements of the plaintiff's case.

U. S. Copper Queen C. & M. Co., 185 U. S. 495.

Metropolitan National Bank vs. Jansen, 108 Fed. 572.

But even if the question were properly before the court there would be no ground for reversal.

The evidence is sufficient to sustain the finding that the defendant was in control of the operation of unloading the vessel in question. It is undisputed that the defendant was at the time, and had for some time previous thereto, been the managing agent of the owners of this vessel. These words, "managing agent," are susceptible of a very broad meaning. They tend to establish in and of themselves the fact that the defendant had full charge of all the business operations of the owners of this vessel, connected with the management of such vessel in every conceivable respect. Under such an authority the defendant may have been given power to employ the master and all other persons upon the vessel.

It appears that one C. D. Kennedy, who was called as a witness for the plaintiff, was employed by defendant and was its local agent at Portland, where the vessel was being unloaded at the time plaintiff was injured. Kennedy does not appear to have had any employment from or connection with the Western Steam Navigation Company. Kennedy did not **know** or **act** for Western Steam Navigation Company in the unloading of the Camino. He was employed and paid by Swain & Hoyt and never told Barsch he was working for the

Western Steam Navigation Company.

The following question and answer in his testimony are significant:

"Q. For what purpose were you agent for them?

A. To act for them here in the capacity of agent in directing the movement of ships that were being run into this port under the Arrow Line." (Trans., p. 17.)

He further testified that it was defendant's money that he paid out in connection with the expenses of unloading this vessel and that he accounted directly to them. (Trans., pp. 16 to 19, and 22 to 27.)

He further testified that Mr. Dosch was employed by him and engaged the longshoremen for most of the ships, and the number of men he needed on the dock. (Trans., p. 19.)

At page 27 he testified in answer to the question by whom he was directed to handle the cargo as follows:

"A. It was understood through the arrangement that I entered into with Swayne & Hoyt, taking the agency there."

On his re-direct examination his evidence is very clear that the defendant was in charge of the

situation. On page 33 of transcript he testified as follows:

Mr. Dosch, who was employed by Mr. Kennedy, was the man whose business it was to call for the longshoremen when they were needed. The testimony of E. A. Schneider shows that Mr. Dosch called for the longshoremen on this occasion for the Swayne & Hoyt people. (Trans., pp. 40-41.) That he took orders from Kennedy, who was employed by the defendant. (Trans., p. 144.)

Mr. Williams, a witness for defendant, testifies that he was timekeeper on this work and was working for defendant. (Trans., pp. 116-130.) And that Kennedy was the agent of defendant. (Trans., p. 130.)

Plaintiff testified that he was employed by defendant. (Trans., pp. 75-78-79-89 to 91, 95-96.) His evidence discloses admissions by defendant to the effect that it was responsible to him. (Trans., pp. 78 to 82-91-95.)

The testimony of Henry Wolf corroborates that of the plaintiff upon the point that defendant was in charge of this work. (Trans., p. 52.)

The evidence that plaintiff signed a payroll **long after the injury** and employment, which indicated that he was being employed by the owners of

the boat (Trans., p. 25), amounts to nothing. The common working man signs such documents without paying the least attention to their provisions. Plaintiff testified that such was the fact in the case at bar. (Trans., p. 98.)

Indeed the court itself treated such evidence as a mere trifle. (Trans., p. 99.)

Moreover the payroll had stamped upon it the words, "Office of Swayne & Hoyt." (Trans., p. 26.) Swayne & Hoyt's money paid the plaintiff and all the men.

A judgment of non-suit or a directed verdict should never be granted where reasonable minds may draw different conclusions from the facts proved.

Stager vs. Troy Laundry Co., 41 Or. 141.

Sullivan vs. Wakefield, 59 Or. 401-405.

Pacific Biscuit Co. vs. Dagger, 42 Or. 513.

Dillard vs. Ollalla Mining Co., 52 Or. 126.

Nutt vs. Isensee, 60 Or. 395.

RESUME OF TESTIMONY IN THIS CASE.

Mr. Kennedy, who had been agent for Swayne & Hoyt in Portland at the time of the accident, and

who was really an unwilling witness on behalf of the plaintiff, was called and testified as follows:

"On the 31st day of March, 1913, and for eleven months prior thereto, I was local agent at Portland for Swayne & Hoyt, defendants in this case, and had been acting for them for eleven months prior thereto. I was appointed at San Francisco through a verbal agreement with Mr. Swayne and Mr. Moran. Mr. Swayne was president of the defendant company and Mr. Moran was manager of the shipping department. My duties were to act for them in the capacity of agent in directing the movements of ships that were being run into the Port of Portland. It was my duty to pay all bills for the ship, its officers, longshore bills, meat bills and any bills that were contracted by the ship while in port, including the bills of men who helped to load and unload the vessel (pages 16, 17 and 25, Transcript of Record). Swayne & Hoyt had freight on the boat (page 17). Gustav Barsch was employed to work on the Camino on the 31st day of March, 1913. Our office had him on the payroll for Swayne & Hoyt. I accounted to them for the money paid out to those men that were employed in working the ship, and Swayne & Hoyt repaid me. It was their money I was paying out to the men for unloading the ship

(pages 18 and 19.) The manner of employing the men to unload the ship was as follows: I have a man in **our** — on Albers' wharf, Mr. Dosch, and he engages the men from longshoremen hall for most all ships; I would not say for this particular ship; probably he did. It was his custom to learn from the mate or officer on the ship how many men he required for the ship, and Mr. Dosch knew how many men **he** required for the dock end of the work, and summing the two numbers of men together he called to the hall for a certain number of men that were wanted for working the ship, which was sent down and so many men were turned over to the ship and so many men kept on the wharf, and after the ship sailed the account of the longshore wages was made up and sent to our office, and the men called at our office for their money and signed their names for it (pages 19 and 20). I remember Gustav Barsch being injured about the 31st day of March. He reported the matter to me. I gave him a letter to Swayne & Hoyt in San Francisco in regard to this accident (page 20). After his interview with Mr. Moran, in San Francisco, at the instance of Swayne & Hoyt, I took him to a doctor to be examined for his injuries. It was my duty as agent to report any accidents that might occur in the port, and I

reported the accident to Swayne & Hoyt, San Francisco. I did not report the accident to the American Transportation Co. because I did not know them. I never knew them in the transaction. I reported this accident to Swayne & Hoyt before Mr. Barsch went to California (pages 20, 23, 30 and 31). I never told Mr. Barsch that he was working for the Western Steam Navigation Company. There was painted over the bow of the steamship Camino, 'Swayne & Hoyt, Inc., San Francisco, Arrow Line, Managers' (pages 31 and 32). Swayne & Hoyt, on March 31, 1913, were the managing agents of the steamship Camino, with power to direct the movements and operations of the officers and crew of said ship, and said ship, and they directed the movements of the ship. They employed the officers of the ship; the officers usually employed the crew. Swayne & Hoyt were over the officers (page 33). Mr. Dosch represented Swayne & Hoyt in looking after the men for unloading that ship (page 38)."

Mr. Schneider, a witness called on behalf of the plaintiff, testified as follows:

"I was business agent and secretary of the Longshoremen's Union on and prior to the 31st day of March, 1913, with power to make contracts for the longshoremen. I knew Gustav Barsch. I know

the Swayne & Hoyt Co. and the steamship Camino. I made the contract for the men for unloading the steamship Camino. Mr. Dosch telephoned up and said he wanted so many men for the dock and so many men for the ship for the purpose of unloading the steamship Camino for the Swayne & Hoyt people (pages 39, 40 and 41). I signed the payroll for Mr. Wolfe's pay in Mr. Kennedy's office for the Swayne & Hoyt people and turned it over to him. Neither the captain of the vessel nor anyone else paid me any money for the men, except the Swayne & Hoyt people through Mr. Kennedy (pages 48, 50 and 51). Captain Ahlin asked me to go down to the vessel and told me that Swayne & Hoyt people were dissatisfied with the conditions in the Port of Portland (page 49)."

Henry Wolfe testified for the plaintiff as follows:

"I am a longshoreman and belong to the same union as Mr. Barsch belongs to (page 51). I was employed by Swayne & Hoyt to assist in unloading the steamship Camino on March 31, 1913. Swayne & Hoyt Co. paid me for my services through Mr. Kennedy, their agent. Mr. Barsch and I were working together at the time Mr. Barsch was injured (page 52). Mr. Dosch phoned for the men and we

went to Albers' dock No. 3, where the steamer was. Mr. Dosch placed the men in their positions. He sent some on the ship and some on the dock and some he told to sort freight, and he put two and two on it—half to land the loads on the dock and pull them inside the dock, and two or three men to sort that freight. They have to look out for the marks. Swayne & Hoyt had freight on the boat, marked in their name (pages 52 and 53). The winchmen were not able to see us from the position they occupied on the ship while we were working on the dock. We were not notified by anyone to get out of the way before the winchman went ahead with his load (pages 56 and 57). They did not have any signal man there or any system of signalling. The duty of the signal man is to give the winchman orders to go ahead and come back. It is his duty to look out and see that nobody gets hurt. When he sees that everything is safe he tells the boys to look and get out (pages 57 and 58)."

On cross-examination Mr. Wolfe testified:

"Schneider told me, Barsch and the other men to go down on the Albers' dock. He got the order from the foreman on the dock (page 62)."

Mr. Ferguson testified on behalf of the plaintiff as follows:

"I am a longshoreman and acquainted with Gustav Barsch. On March 31, 1913, about half past seven in the evening, I was working on the dock taking loads with Mr. Barsch and Mr. Wolfe at the time Mr. Barsch was hurt. They were working on the dock landing the loads on the truck and I was taking the truck away. Mr. Dosch was foreman over us (pages 68 and 69). The winchmen were unable to see Mr. Barsch and Mr. Wolfe at the time Mr. Barsch was hurt (page 70). They had no signal man there (page 71). There was freight on the boat for Swayne & Hoyt (page 72). No one notified us that the winchman was going ahead with the load (page 72)."

Mr. Barsch, the plaintiff, was called as a witness and testified in his own behalf as follows:

"I am the plaintiff in this case and had business relations with Swayne & Hoyt on or about the 31st day of March, 1913. We were called on in the morning by our business agent. He called for I think it was something over thirty men to go down for Swayne & Hoyt people and work on Albers' dock No. 3 on the steamship Camino. When we went there we were put to work on the dock by Mr. Dosch, the general foreman. He places the men sorting freight and others were trucking and others

were landing the load the same as I. I took general cargo out that day up to about seven o'clock that evening. My partner was Mr. Wolfe. Mr. Ferguson was working there, also. I visited Swayne & Hoyt in San Francisco. I went to Mr. Kennedy here first and he gave me a letter of introduction to Swayne & Hoyt in San Francisco. The offices were located on Sansome street. I went to the office and gave the letter to the chief clerk there. The letter was addressed to Swayne & Hoyt and I gave it to him and he says, 'Wait a minute until Mr. Moran is in here. He is the general manager here and attends to these cases.' I waited until Mr. Moran came and he said to me, 'Are you Mr. Barsch?' I says, 'Yes, I am the man that was working for Swayne & Hoyt people in Portland, unloading the steamship Camino.' 'Yes,' he says, 'I heard about that.' Mr. Moran represented to me that he was the general manager. I says, 'I am the man that was working for Swayne & Hoyt in Portland, unloading the steamship Camino, and I got hurt,' He says, 'I heard about that.' He says, 'How bad were you hurt?' I made a statement to him and he said, 'I am very busy today. Come back in a few days, or day after tomorrow, and I will look into this case.' I came back a few days later, I think

it was about two days later or so. I come back to him about 10 o'clock in the morning and I waited until about 12 o'clock. Mr. Moran did not show up. At 12 o'clock I seen him. I said, 'I am here. I want to get some information from you.' 'Well, yes,' he says, 'I haven't—I have been very busy and I haven't looked into your matter yet, and I will be having it done right away.' Finally he commenced talking. 'I am very busy,' he says again. 'I am very busy today. Can you come back at 10 o'clock tomorrow and I will be at liberty to attend to your case for you, and will go to our lawyer and settle our case.' I came back the next morning at 10 o'clock. I waited until 3 o'clock in the afternoon. I asked the clerk, 'Has Mr. Moran been here?' The clerk said, 'No, I haven't seen him.' I got rather angry. I went out and says to the clerk, 'I am going back to Portland tonight and take such action as I see fit,' and I went out the office door and I was not gone more than twenty steps when out comes Mr. Moran and hails me and says, 'Come back here.' I went back to him and he says, 'Now you are the man.' 'Yes,' I say, 'I am Mr. Barsch.' 'I am Mr. Moran,' he says. 'Yes, I know all about that.' He says, 'I will give you a letter, I will send you up to our lawyer who settles all our cases for

us'; and he sent me up to Mr. Campbell, the lawyer. I went up and stated the case. I came back again to see Mr. Campbell. I came back to Portland and came up to Mr. Kennedy's office, and Mr. Kennedy said, 'Here, come in my automobile, and we will go up to the doctor. I got notice from San Francisco to take you to the doctor here in Portland.' And we went to a doctor. Dr. Hamilton examined me. (Pages 75, 78, 79, 80 and 81.) I went back to Mr. Kennedy's office four or five times. Mr. Kennedy said to me he was going to send a night letter right away that night to Swayne & Hoyt, San Francisco, and he waited an answer, and he told me to come back in a day or two and he would surely have an answer. We were trying to make a settlement. Mr. Dosch was the foreman over us. We took orders from him. (Pages 82 and 83.) No one gave us any notice that the winch driver was going ahead with this load that struck me. They had no signal man there at the time I was injured to give signals. It is customary in loading and unloading cargoes from vessels in this port, where winchman is not able or not in position to see the men working on the dock or in the hold, to have a signal man to signal between them (pages 85 and 86). Mr. Kennedy told me that I was working for Swayne & Hoyt

(page 91). The Swayne & Hoyt people in San Francisco acknowledged that I was working for them when I got hurt (page 95). This is my signature on Exhibit 'A,' Voyage No. 12. The signature is right but the pay is not right. I never took any pay at all from that steamer. I didn't take the pay from that steamer until ten weeks after that payroll. I signed that payroll about three weeks after the accident so they could forward it to San Francisco. I signed it under protest. I said, 'I don't know why I signed here for and how it is coming out.' I said, 'I'm hurt and I don't know how it will come out, whether I sign this or whether I got a right to sign this or not, so I don't sign it.' But the clerk told me; he says, 'This payroll has got to go to San Francisco, got to go to Swayne & Hoyt in San Francisco, and we can't send it off,' and he says, 'You are the only one not signed,' so under protest I signed it but didn't take the money. I never read it over; the clerk told me it was the payroll. (Pages 100, 101.)

Q. So you knew from what the clerk told you you were working for the steamer?

A. No. Didn't say we were working for the steamer. Was unloading for Swayne & Hoyt as much as I understand.

Q. Did the clerk tell you you were working for Swayne & Hoyt?

A. It is their steamer.

Court: I suppose it is the same as in every office. They pass out the payroll and say 'Sign it' and they never look (page 99).

I never heard of the Western Steam Navigation Company or that they were the owners of the ship. I never heard that I was working for the Western Steam Navigation Company; neither did Swayne & Hoyt or Mr. Kennedy ever tell me that I was working for the Western Steam Navigation Company. Mr. Dosch put me to work on the dock. He assigned the longshoremen their respective positions here."

Mr. Williams, a witness called on behalf of the defendant, testified as follows:

"On or about the 31st day of March, 1913, I was working for two companies—I was working for the American-Hawaiian Steamship Co. and also was working for Swayne & Hoyt. In working for the American-Hawaiian Steamship Co. I was receiving clerk, and working for Swayne & Hoyt I was timekeeper, or assistant supercargo or foreman.

Q. Now, when you were keeping time there at the time of this accident you say you were in the

employ of Swayne & Hoyt and also of the American-Hawaiian Steamship Co.?

A. No, I didn't say that. I said when I was working for the American-Hawaiian I was working as receiving clerk, and when I was keeping time I was working for Swayne & Hoyt.

Q. Well, at the time you were keeping time for these men you were working for Swayne & Hoyt, were you not?

A. Yes, sir.

Q. You were paid through Mr. Kennedy?

A. I was paid through Mr. Kennedy. I was paid by his payrolls as the longshoremen.

Q. He was the agent of Swayne & Hoyt, wasn't he?

A. He was the agent.

Q. Then you understood you were working for Swayne & Hoyt; you were getting your pay from Swayne & Hoyt, weren't you?

A. I was not getting my pay direct from Swayne & Hoyt. I was getting it from Mr. Kennedy. (Pages 115-130.)"

E. P. Dosch, the dock foreman, a witness called on behalf of the defendant, testified as follows:

"Q. Very well, then, I will try to state definitely. Can you recollect the procedure you went

through in securing men to come down to the wharf to work on the steamship Camino about the 31st day of March, 1913?

A. Well, we always used just one system, that is, if **we** want longshoremen; when ordered to get longshoremen or need them myself, I usually telephone or call at the house and get hold of the business agent of the union, and tell him I want so many men to work such and such a boat at such and such an hour, whatever it may be.

Q. What is your best recollection of the 31st day of March, 1913? Did you employ men for Swayne & Hoyt that day?

A. Well, I couldn't say, because I never do use any name at all; never even use American-Hawaiian Steamship Co. when I order men. Merely call for the men and say that I want 30 men at 7 o'clock at such and such a dock for such and such a steamer, whether the Camino, the Navajo or the Praiso, whatever ship wants men. (Pages 135 and 136.)"

Mr. Hoyt, the vice-president of the defendant company, testified that the Western Steam Navigation Company was the owner and was engaged in unloading the steamship through its agent, and that its agent was C. D. Kennedy, and that Kennedy was responsible for the unloading of the steamship

(pages 150 and 151).

C. D. Kennedy testified (on page 31) that he never heard of the Western Steam Navigation Company and never knew them in the transaction, and was not employed by them but that he was working for Swayne & Hoyt (page 16). This shows that C. D. Kennedy, the agent at Portland, Oregon, was the one who had charge of the unloading of the vessel and who was responsible for the unloading of the vessel according to the defendant's own testimony. The question then to determine is, "Who was C. D. Kennedy agent for?" Mr. Kennedy, in his examination, states that he was agent for Swayne & Hoyt, and not for the Western Steam Navigation Company, and that he never knew the Western Steam Navigation Company; so that if C. D. Kennedy was the agent, as he says, for Swayne & Hoyt, and if he as agent, as testified to by John G. Hoyt, the vice-president of the company, was engaged in and had charge of the unloading of the steamship and assumed the responsibility for the work of unloading the steamship, then he must have acted for Swayne & Hoyt, and his act was the act of Swayne & Hoyt, showing that Swayne & Hoyt had the control and were unloading the boat through him. This question was the question at

issue, was submitted to the jury, and the jury found that Swayne & Hoyt, through their agent Kennedy, were unloading the boat.

Mr. Hoyt further testified on behalf of the defendant in answer to the following questions: "Is it not a fact that on and prior to March 31, 1913, the defendant Swayne & Hoyt, Inc., was the managing agent of the steamship Camino, with power of directing the movements and operations of the officers and crew of said ship and of said ship?" to which the witness answered, "Yes."

The evidence further shows that the witnesses: Messrs. Swayne, president; Hoyt, vice-president, and Moran, manager, of Swayne & Hoyt, all testified that Swayne & Hoyt, Inc., had no contract in writing with the owners of the steamship Camino containing the terms of agreement showing the relationship, the pay they were to receive, and their power and duties, as managers, with the Western Steam Navigation Company, the alleged owners.

There is no evidence that the steamship Camino was engaged in interstate commerce. We believe that the foregoing testimony conclusively shows that Swayne & Hoyt, through its agent Kennedy, was in control of the men who were unloading the boat and was actually unloading the boat for itself.

It employed the men through Kennedy and Dosch to work for Swayne & Hoyt in unloading the boat. Dosch was a sub-agent of defendant, foreman over the men, assigned them their positions to do the work and gave them orders. Having placed them to work, and with apparent power to so do, it looks like he had the power to place a signal man on the dock with a whistle to notify the winchmen, by one whistle to go ahead with the load, or two whistles to stop or let go. It does not appear by the testimony of either the captain or mate that they had control of the unloading, or assigned the men their positions, or that they were in the employ of any other firm or corporation than Swayne & Hoyt. If their testimony had been given, it would show that they were working for and paid by Swayne & Hoyt. Why the defendant did not offer their testimony is only known to defendant itself. Then another strong fact, which shows that the defendants were in control and unloading the boat, is that Swayne & Hoyt paid the men, including plaintiff, with its own money; sent the plaintiff to a doctor, to be examined as to his injuries, and tried to settle the case by sending him to its lawyer, Mr. Campbell. It did not deny its liability. Barsch's conversation with Moran took place before the deposition of Mr.

Moran was taken and he never referred to or denied the testimony of Mr. Barsch. Mr. Williams, defendant's witness, testified that he was working as timekeeper for Swain & Hoyt.

For another reason the defendant is liable. It is an elementary rule of law that an agent may render himself liable as principal upon a contract by failing to disclose his agency. And he cannot escape liability by disclosing the fact that he **is acting as agent,** but he must go further and **clearly indicate the principal** for whom he is acting.

31 Cyc., 1553 to 1558, and cases cited.

It is true that this action is for a tort, but the tort grows out of a breach of duty which is created by one of the implied terms of a contract of employment. In 1 Labatt Master and Servant, Sec. 6, it is said:

> "It is well settled that the duties of the master to his servant arise out of the contract of employment and are limited to those obligations which under that contract he has impliedly agreed to perform."

It is therefore obvious that this rule of law that the agent is liable as principal unless he clearly discloses the name of his principal, applies to every feature of the contract of employment. Not only

does it render the agent liable as principal for the wages to be paid the servant, but it also renders him liable as master for all the implied obligations created by the contract of employment. In other words, for all the purposes of the contract he is the master, not only for the purposes of liability, for compensation, for wages, but also for the purposes of liability, for compensation to the servant for breach of the implied obligation to furnish a safe place to work and safe instrumentalities, etc. **In such a case the question is not whether the agent is in fact in control of the work**, because under such circumstances **another principle** comes into play, and this is the principle of estoppel. The party who has in law held himself out as master and therefore as in control of the work, will, so far as the servant is concerned, be deemed to be in control of the work. And this is an eminently **just principle.** Any other rule of law would place the servant in the following position: He would go to work for A, knowing him to be financially responsible for injuries, and then after he has been injured he would discover that he has a worthless claim for damages against B, who is in fact the principal in the transaction. If A, the agent, desires to relieve himself of this responsibility, he has the simple

means in his power of doing so by informing the servant that he, A, is not the master, but is in fact acting as agent for B.

In the case at bar the defendant held itself out as being in control of the work of unloading the vessel in various ways. But the most conspicuous and conclusive representation of this kind for which it is responsible is the fact that on the bow of the boat was painted the words: "Swayne & Hoyt Company, Managers." Does the word "Manager" indicate to the public who the real principals are? It certainly does not. It does not indicate that the defendant was acting for the owners of the boat, nor does it indicate that they were acting for a charterer of the boat. The plaintiff as servant was not in this or any other way notified of the crucial point as to who was actually engaged in the business of unloading this boat aside from the defendant itself. He was employed for this special purpose and had no interest in the question, who was the owner or the charterer, but merely in the question, who was doing the work of unloading this vessel. And everything indicated to him, as a plain man of common understanding, that he was dealing exclusively with the defendant.

The trouble with the authorities cited by plain-

tiff in error on this point is that in those cases the agent assumed to deal as agent for the owners of the vessel, but here the defendant did not represent to plaintiff that in hiring him to help unload this vessel, it was acting exclusively as agent for the owners of the vessel. On the contrary, it represented to him that it was manager in control of the whole situation. And even if the word "Manager" contained a hint that someone else might be engaged in this work it did not point out the particular person the defendant was manager for.

It is well settled that nothing short of actual knowledge of the identity of the principal will relieve the agent from liability.

Robbins vs. Phelps, 5 Minn. 463.

Cobb vs. Knapp, 71 N. Y. 348.

Mahoney vs. Kent, 28 N. Y. Supp. 19.

Kneeland vs. Coatsworth, 9 N. Y. Supp. 416.

Book vs. Jones, 98 S. W. 891.

Indeed there is very eminent authority for the proposition that the defendant is liable even though it was engaged in unloading this vessel as managing agent for the owners, and the plaintiff knew this to be the fact. In the last analysis the

question of liability is always a question of **control,** and the duties and powers of a managing agent may be such that he is as much in control of the work as the principal would be if he were personally present. In such cases when the principal turns over the entire work to the managing agent, giving him unlimited power and discretion in the matter, the managing agent is the principal and responsible as such. Indeed this is a rule founded on sound policy, because it obviates the necessity of two actions. Undoubtedly the principal can always fall back upon the managing agent for indemnity in case the principal is held liable to the servant; and the result is that, at the end of two lawsuits, the managing agent has been required to pay the damages for his improper management of the business. This rule which renders the managing agent under such circumstances directly liable to the servant works no injustice to the managing agent, and accomplishes in one lawsuit what would otherwise take two lawsuits to accomplish. There is an especial reason for applying this doctrine to the case of vessels coming into port and sailing away again where the owner is a foreign corporation and cannot be served with process in the state where the injury happens. This question is exhaustively discussed

by the court in

Tippecanoe Loan & Trust Co. vs. Jester, 101 N. E. 915.

In this case the managing agent of a building was held liable for an injury sustained by a defect in an elevator, the allegation of the complaint being that such agent had full charge and complete control of the management and operation of the business.

No one quotation from the opinion in this case will do justice to the exhaustive discussion of it, and we, therefore, **earnestly request the court to read the entire opinion so far as relates to this point.**

See pp. 916, 920.

THE TRIAL COURT DID NOT ERR IN APPLYING THE OREGON EMPLOYERS' LIABILITY ACT OF 1911.

We wish in this connection first to call the court's attention to the fact that the question as to whether or not the trial court erred in applying the Employers' Liability Act of Oregon is not properly before the court for review. This question is attempted to be raised by virtue of the fourth assignment of error, which said assignment is entirely

without foundation in the record. This assignment is directed to an alleged error of the court in charging the jury. But when we turn to the bill of exceptions we find that no portion whatever of the charge was excepted to. It therefore stands as the conceded law of the case, from the acquiescence of the plaintiff in error, that that portion of the charge embraced in this assignment of error correctly states the law.

But assuming that this assignment is properly before the court for review, our argument on this point will take the following course:

1. THE PLAINTIFF WAS INJURED WHILE HE WAS WORKING UPON THE DOCK AT PORTLAND, IN THE STATE OF OREGON. ADMIRALTY HAS NO JURISDICTION OVER A TORT CONSUMMATED UPON LAND AND AWAY FROM NAVIGABLE WATERS; BUT THE LAW OF OREGON FIXES THE RIGHTS OF THE PARTIES.

(a) Admiralty has jurisdiction of maritime torts only.

(b) The jurisdiction of courts of Admiralty, in matters of contract, depends upon the nature and character of the contract; but in tort, it depends entirely upon locality.

(c) Personal injuries received on shore, although caused by negligence originating on a ship, are not within the jurisdiction of Admiralty.

(d) The law in force where the injury happens fixes the rights of the parties, and if this law is statutory rather than common law, the statute must be followed.

2. THE "CAMINO" WAS NOT ENGAGED IN INTERSTATE COMMERCE, BUT ASSUMING THAT SHE WAS SO ENGAGED, SHE WOULD NEVERTHELESS BE SUBJECT TO THE OREGON EMPLOYERS' LIABILITY ACT OF 1911, AT LEAST IN SO FAR AS THAT ACT REQUIRES A SYSTEM OF COMMUNICATION BY MEANS OF SIGNALS, FOR THE SAFETY OF EMPLOYEES AND THE PUBLIC.

(a) States have a right to legislate on all subjects relating to the health, life and safety of their citizens, even though such legislation might indirectly affect foreign or inter-commerce.

(b) Wherever there is any business in a state, in which, from the instrumentalities used, there is danger to life or property, it is the plain duty of the state to make provision against accidents likely to follow in such business, so that the dangers attending it, may be guarded against so far as it is

practicable; and such enactments will be sustained even if interstate commerce is thereby indirectly affected.

(c) Where a state statute contains several provisions, some of which attempt to regulate interstate commerce, and others which do not, the provisions are separable, and while the first part may be void as a regulation of interstate commerce, it will not affect the validity of the remaining provisions of the statute.

(d) A person claiming that a state statute violates the Federal Constitution must bring himself, by proper averments and showing, within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates to deprive him of rights protected by the Federal Constitution.

1. THE PLAINTIFF WAS INJURED WHILE HE WAS WORKING UPON THE DOCK AT PORTLAND, IN THE STATE OF OREGON. ADMIRALTY HAS NO JURISDICTION OVER A TORT CONSUMMATED UPON LAND AND AWAY FROM NAVIGABLE WATERS; BUT THE LAW OF OREGON FIXES THE RIGHTS OF THE PARTIES.

(a) Admiralty has jurisdiction of maritime torts only.

We do not dispute the claim advanced by plaintiff in error, in its brief, that a stevedore's employment is a maritime contract, and that such a contract would be governed by the Admiralty or Maritime law. No issue can possibly arise in this case about a maritime contract, for the reason that the plaintiff below did not bring action on a maritime contract, or seek to enforce any rights growing out of a maritime contract. He commenced an action for personal injuries sustained by him, which injuries grew out of the commission of a non-maritime tort. A reference to the complaint and testimony and also to the brief of plaintiff in error will disclose that, at the time of the injury complained of, Barsch was standing on the dock, and was in the act of releasing the sling from an iron beam which had been raised from the hold of the vessel and deposited on the dock, when the winch driver started up the engine before Barsch had completed his operations, with the result that one end of the beam was suddenly lifted, and struck Barsch. Barsch, during all this time, was not standing on the vessel or on the waters, but was standing and working on the dock, and his injuries were con-

summated on the dock.

In the case of Thomas vs. Lane, 2 Sumn. 9, Mr. Justice Story observed that

> "In regard to torts, I have always understood that the jurisdiction of Admiralty is exclusively dependent upon the locality of the act. The Admiralty has not, and never, I believe, deliberately claimed to have, any jurisdiction over torts, except such as are maritime torts."

This rule has been repeatedly followed, without exception, by the Supreme Court; the last time in an opinion by Mr. Justice Hughes, in the case of Atlantic Transport Co. vs. Imbrovek, 234 U. S. 52, decided in 1914.

See also

The Plymouth, 3 Wall. 20;

Philadelphia, etc., vs. Philadelphia, etc., 23 How. 209;

Johnson vs. Elevator Co., 119 U. S. 388,

and the authorities cited by Mr. Justice Hughes in Atlantic Transport Co. vs. Imbrovek supra.

(b) The jurisdiction of courts of Admiralty, in matters of contract, depends upon the nature and character of the contract; but in tort, it depends

entirely on locality.

According to the rule laid down by the Supreme Court, Admiralty has no jurisdiction of a tort unless the substance and consummation of the wrong took place on navigable water. Where the consumation of the wrong occurs on the land, Admiralty has no jurisdiction.

In the case of

The Plymouth, supra,

a vessel caught fire, owing to the negligence of its officers and crew, and by reason of the fact that the vessel was tied to a wharf, the fire spread to the wharf and it was destroyed. The owners of the wharf filed a libel in Admiralty against the owners of the vessel to recover damages therefor. The court held Admiralty had no jurisdiction because the consummation of the injury occurred on land.

To the same effect, see

Atlantic Transport Co. vs. Imbrovek, supra.

Philadelphia, etc., vs. Philadelphia, etc., supra.

(c) Personal injuries received on shore, although caused by negligence originating on a ship, are not within the jurisdiction of Admiralty.

The Plymouth, supra.

Atlantic Transport Co. vs. Imbrovek, supra.

Price vs. The Belle of the Coast, 66 Fed. 62.

The H. S. Pickands, 42 Fed. 239.

(d) The law in force where the injury happens fixes the rights of the parties, and if this law is statutory rather than common law, the statute must be followed.

We believe that we have completely demonstrated that the present case is not one of Admiralty cognizance, and not being such a case as is governed by the Admiralty rules, the question is presented as to what law is applicable.

The Supreme Court has long since established the rule to be that the law in force where the injury happens fixes the rights of the parties.

See

N. P. Ry. Co. vs. Babcock, 154 U. S. 190.

Stewart vs. B. & O. Ry., 168 U. S. 445.

See also

The "BEE," 216 Fed. 709.

The injury here complained of was consummated on Oregon soil, away from navigable waters, and therefore the law of Oregon governs the case. The complaint sets forth a state of facts which necessarily brings the action within the Oregon Employ-

ers' Liability Act, and the tort being non-maritime, and the Liability Act being in force in Oregon at the time of the injury, that is the law which governs the case, and which fixes the rights and liabilities of the parties.

The cases cited by the plaintiff in error in its brief, such as

Schuede vs. The Zenith S. S. Co., 216 Fed. 566; and

The Henry B. Smith, 195 Fed. 312,

are cases involving strictly maritime torts, which come within the Admiralty jurisdiction, and therefore have no application in the case at bar.

2. THE "CAMINO" WAS NOT ENGAGED IN INTERSTATE COMMERCE, BUT, ASSUMING THAT SHE WAS SO ENGAGED, SHE WOULD NEVERTHELESS BE SUBJECT TO THE OREGON EMPLOYERS' LIABILITY ACT OF 1911, AT LEAST IN SO FAR AS THAT ACT REQUIRES A SYSTEM OF COMMUNICATION BY MEANS OF SIGNALS, FOR THE SAFETY OF THE EMPLOYEES AND THE PUBLIC.

Counsel for plaintiff in error says, in his brief, that it was conceded that the "Camino" was engaged in interstate commerce. We do not see

where he obtains authority for his statement, and we challenge the assertion. Nowhere in the record, either in the complaint, answer, reply or the testimony does it appear either directly or by legitimate inference that the "Camino" was engaged in interstate commerce. Certainly the fact that her owners resided, or had their place of business in San Francisco, does not prove that the vessel was engaged in interstate commerce.

But, passing that point by, we will assume, for the purpose of the argument, that the record discloses that the "Camino" was engaged in interstate commerce.

(a) States have a right to legislate on all subjects relating to the health, life and safety of their citizens, even though such legislation might indirectly affect foreign or interstate commerce.

In the case of Southern Railway Co. vs. King, 217 U. S. 524, the court, speaking through Mr. Justice Day, said:

> "It has been frequently decided in this court that the right to regulate interstate commerce is, by virtue of the Federal Constitution, exclusively vested in the Congress of the United States. The state cannot pass any law directly regulating such commerce. Attempts

to do so have been declared unconstitutional in many instances, and the exclusive power in Congress to regulate such commerce uniformly maintained. While this is true, the right of the states to pass laws not having the effect to regulate or directly interfere with the operations of interstate commerce, passed in the exercise of the police power of the state, in the interest of public health and safety, have been maintained by the decisions of this court."

In Crutcher vs. Kentucky, 141 U. S. 47, the court said:

"It is also within the undoubted province of the State Legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves, and generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations effect, to some extent, the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of Congressional regulations over the same subject, are free from all constitutional

objections, and unquestionably valid."

Again in the case of The James Gray vs. The John Fraser, 62 U. S. 184, the Port of Charleston, by ordinance, enacted a law that all vessels anchored in the harbor keep a light burning on board from dark until daylight, suspended conspicuously midships, twenty feet high from the deck. A vessel, engaged in foreign commerce, used a different sort of light from the one prescribed by the ordinance, and a collision occurred.

It was urged that the city had no power to make such a regulation, on the ground that it constituted an interference with foreign commerce and violated the Federal Constitution.

The court, speaking through Mr. Chief Justice Taney, answered this objection by remarking that:

> "Regulations of this kind are necessary and indispensable in every commercial port for the convenience and safety of commerce. And the local authorities have a right to prescribe * * * what description of light a vessel shall display to warn passing vessels of her position. Such regulations are like to the local usages of navigation in different ports, and every vessel, from whatever part of the world she may come, is bound to take notice of them and to conform to

them. And there is nothing in the regulations referred to in the Port of Charleston which is in conflict with any laws of Congress regulating commerce, or with the general Admiralty jurisdiction conferred on the courts of the United States."

A similar question was presented in Henning-ton vs. Georgia, 163 U. S. 299, where the court held that:

"It is clear that legislative enactments of the states passed under their admitted police powers, and having a real relation to the domestic peace, order, health and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce, and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union, until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the constitution. Local laws of the character mentioned have their source in the powers which

the states reserved and never surrendered to Congress, of providing for the public morals, and the public safety, and are not, within the meaning of the constitution, and considered in their own nature, regulations of interstate commerce, simply because, for a limited time, or to a limited extent, they cover the field occupied by those engaged in such commerce."

(b) Wherever there is any business in a state, in which, from the instrumentalities used, there is danger to life or property, it is the duty of the state to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as it is practicable; and such enactments will be sustained, even if interstate commerce is thereby indirectly affected.

This is the rule laid down in the case of Nashville Ry. vs. Alabama, 128, U. S. 96.

To the same effect see

Sherlock vs. Alling, 93 U. S. 99.

Chicago vs. Solan, 169 U. S. 133.

Simpson vs. Shepard, 230 U. S. 352.

The United States Supreme Court in Simpson vs. Shepard, 230 U. S. 352, has settled this point. In this case the court said:

"But within these limitations there necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede. Further it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or directly be involved. Our system of government is a practical adjust-

ment by which the national authority as conferred by the constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to the care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitution system has thus been made possible. * * *

"Interstate carriers, in the absence of Federal statute providing a different rule, are answerable according to the law of the state for nonfeasance or misfeasance within its limits.

Chicago, M. & St. P. R. Co. vs. Solan, 169 U. S. 133, 137, 42 L. ed. 688, 692, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. vs. Hughes, 191 U. S. 477, 491, 48 L. ed. 268, 273, Sup. Ct. Rep. 132; Martin vs. Pittsburg & L. E. R. Co., 203 U. S. 284, 294, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; Southern P. R. Co. vs. Schuyler, 227 U. S. 601, 613, ante, 662, 669, 33 Sup. Ct. Rep. 277. Until the enactment by Congress of the act of April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322, the laws of the states determined the liability of interstate carriers by railroad for injuries received by their employes while engaged in interstate commerce, and this was because Congress, although empowered to regulate the subject, had not acted thereon. In some states the so-called fellow-servant rule obtained; in others, it had been abrogated; and it remained for Congress, in this respect and in other matters specified in the statute, to establish a uniform rule. Second Employers' Liability Cases (Mondou vs. New York N. H. & H. R. Co.), 223 U. S. 1, 56 L. ed. 327, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169; Michigan C. R. Co. vs. Vreeland, 227 U. S. 59, 66, 67, ante,

417, 419, 420, 33 Sup. Ct. Rep. 192."

The tort in question was not a maritime tort as it was consummated on the land; and therefore in determining whether the facts create a liability we must look to the laws of the State of Oregon and not to the maritime law.

Johnson vs. Chicago & El. Co., 119 U. S. 388.

The John C. Sweeny, 55 Fed. 540.

1 Cyc., 843, and cases cited.

The Arkansas, 17 Fed. 383.

The Supreme Court of Oregon and the United States District Court for the District of Oregon have held the Employers' Liability Law in question applicable to a case of this kind.

Gynther vs. Brown & McCabe, 134 Pac. 1186.

The Bee, 216 Fed. 709.

In the present case, the plaintiff in error protests against the Oregon Employers' Liability Act, and says that because it requires all employers using dangerous machinery, other than machinery driven by hand power, to install a system of communication by means of signals, where the safety of the employees and the public requires it, the act

amounts to a regulation of interstate commerce.

The statute in question was enacted by the State of Oregon in pursuance of the police power, which includes the safety of the life and limb of its citizens, and the state had the right to make such a law to safeguard the life and limb of its people. The act applies to all persons in the state engaged in the occupations specified and operates on all alike. It does not single out employers engaged in interstate commerce, but applies equally to all persons, whether engaged in interstate commerce, intrastate commerce, or any business whatsoever. The act does not attempt to regulate interstate commerce, and only indirectly and to a very slight degree indeed can it be said to interfere with interstate commerce.

This case is wholly unlike the cases cited by plaintiff in error, and is readily distinguishable from South Covington Ry. vs. Covington, 36 Sup. Ct. Rep. 158, mentioned in the brief of plaintiff in error, and on which great reliance is placed.

The ordinance of the City of Covington in the latter case, in so far as it declared the number of passengers that might ride on a car in Covington, amounted to a direct interference with interstate commerce with respect to cars passing be-

tween Covington, in the State of Kentucky, and Cincinnati, in the State of Ohio, for if Cincinnati should establish a different regulation, and should set the number of persons who might ride on such cars at a different figure from that established by Covington, it would be absolutely impossible for both laws to be observed.

But, in our present case, no such complicated situation could arise. It is entirely possible for a vessel calling at an Oregon port to use a system of signals while in Oregon, and it likewise is possible to use a similar or even a different system of signals in California and Washington, or to make use of no system of signals at all, if none is required in other states. The Oregon law does not even attempt to say what sort of a signal system shall be used. All that it requires is that the system shall provide prompt and efficient communication. One man blowing a whistle is quite sufficient to satisfy the requirements of the Oregon Employers' Liability Act. The observance of the Oregon law does not render it impossible to observe the laws of other states.

We note that counsel for plaintiff in error, in his brief, speaks of the Oregon Liability Act as a safety appliance act, and in his argument, treats it

as such, and says it would be impossible for a vessel to comply with all the minute regulations and safety appliances required.

We desire here to call the attention of the court to the fact that the entire act was not applied in this case, as a reading of the trial court's instructions to the jury will disclose; but only that part which requires a signal system to provide means of communication where dangerous machinery, not driven by hand power, is used. The only question that can arise on this appeal with reference to the Oregon Employers' Liability Act is whether the act is invalid in so far as it requires persons in charge of a vessel to install a system of communication by means of signals, where in the process of unloading, on shore, dangerous steam-driven machinery is used. We believe that the authorities which we have heretofore cited in this brief abundantly prove that the signal system feature of the act is valid and constitutional, and should be sustained as a valid exercise by the State of Oregon of its police power. Vessels used as interstate carriers, were held to come within the purview of the act by the Supreme Court of Oregon in the case of Gynther vs. Brown & McCabe, 67 Ore. 310, and by U. S. District Court of Oregon in the case of "The Bee," 216 Fed. 709.

(c) Where a state statute contains several provisions, some of which attempt to regulate interstate commerce and others which do not, the provisions are separable, and while the first part may be void as a regulation of interstate commerce, it will not affect the validity of the remaining provisions of the statute.

The above rule is laid down by the Supreme Court in the recent case of So. Covington Ry. vs. Covington, supra. So that, even if that portion of the Oregon Employers' Liability Act which requires the installation of certain safety appliances can be considered as a regulation of interstate commerce under any circumstances, it could not have the effect of vitiating that section of the act which requires a system of signals, which section is manifestly not a regulation of or an interference with interstate commerce.

(d) A person claiming that a state statute violates the Federal Constitution must bring himself, by proper averments and showing, within the class as to whom the act attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates to deprive him of his rights protected by the Federal Constitution.

Swayne & Hoyt, who now urge that the Oregon Employers' Liability Act violates the Federal Constitution, for the reason, so they say, that it is a regulation of interstate commerce, are in no position to attack the law now. It is not averred in their answer or in any pleading that the "Camino" was engaged in interstate commerce. Neither was there any showing of any kind, either in the testimony or pleadings, that the "Camino" was an interstate carrier. Likewise, Swayne & Hoyt made no effort at showing in what manner, if at all, the act injured them or operated to deprive them of any rights guaranteed to them by the Constitution of the United States.

Under the ruling of the Supreme Court, in the case of Southern Ry. vs. King, supra, Swayne & Hoyt will not now be heard to say that the act is unconstitutional.

Mr. Justice Day, in the course of the opinion in the last mentioned case, observed that

> "It is the settled law of the court that one who would strike down a state statute, as violative of the Federal Constitution must bring himself, by proper averments and showing, within the class, as to whom the act thus attacked is unconstitutional. He must show that

the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of his rights protected by the Federal Constitution."

It is urged that plaintiff's injuries were caused by the negligence of the winchman and that he was the employee of the owners of the vessel and not of the defendant, and that, therefore, defendant is not responsible.

In answer to this, we insist that the defendant was in charge of the entire work of unloading the vessel and that all the persons concerned therein were its servants, the foreman being its agent under the Employers' Liability Law of Oregon. But even if we assume that the defendant had no control over the winchman and is in no manner responsible for his carelessness, the case would not be different. Under the Employers' Liability Law it was the duty of the defendant to provide a system of communication by means of signals so that the winchman would not start the engine until the proper time when it could be safely done. Whatever the facts might be, this duty would remain an absolute duty. If this duty had been discharged and in spite of a proper signal being given the winchman had negligently disregarded it, a differ-

ent question would be presented. In such a case the proximate cause of the plaintiff's injuries would be, not the failure of the defendant to provide a proper means of communication by signals, but the disregard of the signals by the servant of another master. Such, however, is not the case at bar. The case shows that the winchman started the engine at the wrong time, because of the fact that there was not proper means of communication between him and the plaintiff furnished, as required by the statute. That this statutory duty rested absolutely upon the defendant must be taken to be the law of this case, for the court so charged the jury and no exception was taken to such charge. Even if we assume that defendant would have had no right to place any one on the vessel to give the proper signal, this would in no manner lessen the statutory obligation of the defendant to protect its servants by establishing a proper communication between him and the winchman in some other feasible way on the wharf. But, of course, it is absurd to argue that there was the slightest obstacle in the way of this defendant (whose word would, in this respect, be absolutely controlling with the mate of the ship) in placing on the vessel or any where else the necessary person to establish communica-

tion between the plaintiff and the winchman. The argument of defendant's counsel that when two masters are engaged in a common work, neither is responsible for the carelessness of the servants of the other, has not the slightest relevancy to this case, for the proximate cause of the plaintiff's injuries was not the carelessness of the winchman, but the neglect of the defendant in failing to discharge its absolute statutory duty to the plaintiff of furnishing the necessary means of communication to safeguard him against peril.

See in this connection the language of the court in Gynther vs. Brown & McCabe, 134 Pac. 1186, at page 1189.

We respectfully submit that the judgment should be sustained.

GILTNER & SEWALL,
Attorneys for Defendant in Error.